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IN THE

Supreme Court of the United States

October Term, 1934.

JOHN C. SCHUMACHER, Sheriff of Butler County, Ohio,

Petitioner and Appellee Below,

v.

RALPH K. BEELER, Trustee in Bankruptcy of The Long & Allstatter Company, Bankrupt,

Respondent and Appellant Below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable the Chief Justice and Justices of the Supreme Court of the United States:

Your petitioner, John C. Schumacher, Sheriff of Butler County, Ohio, respectfully shows to this honorable court:

A.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

The question as to the jurisdiction of the United States District Courts is presented by this petition. That question is whether under Sec. 23b of the Bankruptcy Act, in the absence of diversity of citizenship, the defendant can con-

sent to jurisdiction or can confer jurisdiction by consent; in other words, whether that section deals with jurisdiction or venue. Upon this subject the lower federal courts are in conflict.

The proceeding in this case was an alleged plenary suit in equity filed in the United States District Court for the Southern District of Ohio, Western Division, on August 26, 1933, by Ralph K. Beeler, Trustee in Bankruptcy of The Long & Allstatter Company of the City of Hamilton, Butler County, Ohio, a corporation under the laws of Ohio, a bankrupt on and under its voluntary petition filed in cause No. 10326 on the Bankruptcy docket of said District Court, on April 4, 1933, and the immediate adjudication of it as such by the court on said day, to enjoin John C. Schumacher, Sheriff of said Butler County, Ohio, and a resident of Hamilton, Ohio, the defendant designated in the caption of said alleged bill in equity, which was labelled as an "Application" (R. 1), from proceeding with, causing or permitting the sale of any property of the bankrupt as set forth in Exhibit 1 attached to said "Application," (R. 3-33), on August 28, 1933, or any other day.

The property set forth in said Exhibit 1 (R. 3-33) had been levied upon by said Sheriff of Butler County, Ohio, on June 16, 1932, under a writ of execution issued by the Court of Common Pleas of Hamilton County, Ohio, upon a judgment rendered by that court on June 10, 1932, in an action in said court, in favor of A. Hunter Willis against The Long & Allstatter Company, a corporation under the laws of Ohio, for $107,243.36, which said judgment had, prior to said April 4, 1933, been affirmed by the court of last resort in Ohio.

After the return of the first writ of execution on August 8, 1932, reciting the levy, but without any sale, orders of sale (*venditioni exponas*) were issued every 60 days, under and in accordance with the Statutes of Ohio, commanding

said Sheriff to forthwith sell, or cause to be sold, the property levied upon. Under the Statutes of Ohio, the Sheriff may sell real property as well as personal property under a writ of execution and orders of sale thereon, without any other proceeding. Secs. 11655, 11664, 11672, 11675, 11678, 11681, 11688 General Code of Ohio; *Morgan* v. *Kinney*, 38 Ohio State Rep. 610.

On August 30, 1933, said Sheriff filed a motion to dismiss said plenary suit, No. 866 on the Equity Docket of said District Court, on several grounds stated in said motion, the first of which was that the court was without jurisdiction to entertain a suit in equity in the matter against the designated defendant (R. 19).

On September 11, 1933, said Sheriff filed an answer in said cause No. 866 in which he purported to withdraw his motion to dismiss the cause and to enter his appearance and to consent that the court might hear and determine all matters referred to in the petition (R. 33-35).

On the next day, September 12, however, said Sheriff filed a motion for leave to withdraw said answer (R. 35).

On November 6, 1933, the District Court entered an order, temporarily restraining and enjoining said Sheriff of Butler County, Ohio, for a period of ten days from said date, from proceeding with or permitting the sale of any of the property of said bankrupt set forth in Exhibit 1, attached to said petition (R. 35, 36).

On November 10, 1933, said Sheriff of Butler County, Ohio, again filed a motion to dismiss said suit on the same grounds, of which the first one was that the court was without jurisdiction to entertain a suit in equity in the matter against the designated defendant (R. 37, 38).

On November 16, 1933, said District Court granted said motion of said Sheriff, filed as aforesaid on November 10, 1933, and dismissed said alleged suit. As stated, one of the grounds of the motion was that the court was without jurisdiction to entertain a suit in equity in the matter against

the designated defendant, for the reason that there was no diversity of citizenship.

On appeal to the United States Circuit Court of Appeals for the Sixth Circuit, that court reversed the order of the District Court, dismissing said suit (R. 56).

The Circuit Court of Appeals held that under Sec. 24 of the Judicial Code, as amended (Feb. 28, Sec. 41, U. S. C. A.) and by virtue of the answer filed by the sheriff, the District Court had jurisdiction "by consent of the proposed defendant" under Sec. 23b of the Bankruptcy Act (Tit. 11, Sec. 46[b], U. S. C. A.).

The following excerpts from the opinion plainly indicate the point upon which the Court of Appeals predicated its decision.

> Simons, Circuit Judge. "We come then to the question of jurisdiction in 6705, and whether the Trustee can maintain his action in the District Court against the Sheriff of Butler County, both of them being residents of the State of Ohio. This involves consideration of Section 23 of the Bankruptcy Act, being Section 46b, Title 11, U. S. C. A., as amended by the Act of 1926, which provides:
>
> > 'Suits by the trustee shall be brought or prosecuted only in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property, etc.'
>
> "The meaning of this section was very thoroughly discussed by Judge Denison in *Toledo Fence & Post Company* v. *Lyons,* 290 Fed. 637, at 644. It was in that case the view of a majority of the court that except for this section the Federal court would have jurisdiction of all suits by a trustee to recover debts due the bankrupt, as being suits arising under the laws of the United States. Section 23 puts a limitation upon that power, but there is an exception to the limitation.

The exception relates to suits against parties who voluntarily appear and submit their rights to the court in a plenary suit by the Trustee. It was thought by the court that it would be unfortunate if such submission were held to be ineffective to permit defendants to voluntarily appear and submit their rights in the endeavor common to them and the trustee to get a speedy decision of all questions by one court (R. 59, 60.)

* * * * * * * * *

"We come then to the question of consent in the instant case. When the trustee first filed his plenary suit the defendant sheriff moved to dissolve the restraining order and to dismiss the suit on the ground, among others, that the court was without jurisdiction to entertain it. Eleven days later, however, the sheriff filed an answer whereby he expressly withdrew the motion to dissolve the temporary restraining order and the motion to dismiss the suit, entered his general appearance, and consented that the court might hear and determine all matters referred to in the petition therein. The very next day the sheriff asked leave to withdraw the answer. What disposition was made of the last motion the record does not disclose. It is to be assumed, however, that it was not pressed, since nothing was done until a month later, when upon a second motion to dissolve and dismiss, the order now appealed from was entered. We cannot doubt that under these circumstances, and under familiar rules, there was that consent to the jurisdiction of the court which operates as an exception to the limitation imposed by Section 23, as interpreted in the *Toledo Fence & Post* case. Certainly there was deliberation rather than inadvertence in the filing of the answer, evidenced by the specific withdrawal of the first motion to dismiss, the entry of a general appearance, and the express submission of all controversy to disposition by the court." (R. 60, 61.)

* * * * * * * * *

"It follows that in 6705 the cause must be reversed and remanded to the District Court with instructions

to set aside the order of dismissal, hear the controversy upon its merits, make appropriate findings of fact and conclusions of law, and enter such decrees, interlocutory or final, as equity may require." (R. 61.)

B.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of the Circuit Court of Appeals for the Sixth Circuit in the instant case is in conflict with the decisions of the Circuit Court of Appeals for the Ninth, Second, and Fifth Circuits in the following cases:

Matthew, et al., v. *Coppin*, 32 Fed. (2d) 100 (1929), (C. C. A. 9th Cir.).
Rackmore v. *New Jersey Fidelity & Plate Glass Ins. Co.*, 65 Fed. (2d) 341 (1933), (C. C. A. 2nd Cir.).
Blair v. *Brailey*, 221 Fed. 1 (1915), (C. C. A. 5th Cir.).
In re Maier Brewing Co., Inc.; Simons v. *Wells*, 65 Fed. (2d) 673 (1933), (C. C. A. 9th Cir.).

2. The decision of the Circuit Court of Appeals for the Sixth Circuit in the instant case is an erroneous decision of an important question of general law and is in conflict with the weight of authority.

3. The decision of the Circuit Court of Appeals for the Sixth Circuit in the instant case involves an important question of Federal law which has not been, but should be, settled by this court.

4. The decision of the Circuit Court of Appeals for the Sixth Circuit in the instant case is a decision of a federal question in a way probably in conflict with applicable decisions of this court, to-wit the cases of:

Lovell v. *Isidore Newman & Son*, 227 U. S. 412, 426 (1913).
Bush v. *Elliott*, 202 U. S. 477, 483 (1906).
Taubel, etc., Co. v. *Fox*, 264 U. S. 426 (1924).
Straton v. *New*, 283 U. S. 318 (1930).

5. The decision of the Circuit Court of Appeals for the Sixth Circuit in the instant case so far departs from the accepted and usual course of judicial proceedings, or so far sanctions such departure by the lower court, as to call for an exercise of this court's power of supervision.

6. The Court of Appeals erred in holding that general jurisdiction can be conferred by consent under the provisions of Sec. 23b of the Bankruptcy Act (Tit. 11, Sec. 46b, U. S. C. A.).

7. The Court of Appeals erred in holding that the county sheriff in the instant case, to whom, and as an officer of such State Court, a writ of execution and order of sale had issued out of the Court of Common Pleas of Hamilton County, Ohio, upon a judgment rendered by that court more than nine months before the filing of the voluntary petition in bankruptcy, under which a levy had been made by said Sheriff more than nine months preceding the bankruptcy, could by consent oust the jurisdiction of the State court and confer a general jurisdiction on the United States District Court sitting in equity, under the provisions of Sec. 23 of the Bankruptcy Act. (Tit. 11, Sec. 46, U. S. C. A.), and Sec. 24 of the Judicial Code, as amended (Tit. 28, Sec. 41, Par. 1, U. S. C. A.).

Your petitioner presents herewith as part of this petition a certified copy of the transcript of the record, including all proceedings in said cause in the District Court and in the said Circuit Court of Appeals.

C.

PRAYER FOR WRIT.

Wherefore, your petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this court on a day certain to be

therein designated, a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals in said case on its docket and entitled: "No. 6705, *Ralph K. Beeler, Trustee in Bankruptcy of The Long & Allstatter Company, Bankrupt, Appellant,* v. *John C. Schumacher, Sheriff of Butler County, Ohio, Appellee,*" to the end that said case may be reviewed and determined by this court as provided by the United States Statutes and that the judgment herein of said United States Circuit Court of Appeals be reversed by the court and for such further relief as to this court may seem proper.

JOHN C. SCHUMACHER,
Sheriff of Butler County, Ohio,
Petitioner,

By FRANK H. SHAFFER, JR.,
Attorney for Petitioner.

PAUL A. BADEN,
Prosecuting Attorney of Butler County,

JOHN W. PECK,
COLEMAN AVERY,
Of Counsel.

IN THE

Supreme Court of the United States

October Term, 1934.

JOHN C. SCHUMACHER, Sheriff of Butler County, Ohio,

Petitioner and Appellee Below,

v.

RALPH K. BEELER, Trustee in Bankruptcy of The Long & Allstatter Company, Bankrupt,

Respondent and Appellant Below.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Sixth Circuit was filed June 29, 1934 (R. 56-61). (Unreported.)

The order of the District Court was entered November 16, 1933 (R. 39, 40).

II.

JURISDICTION.

It is claimed that this court has jurisdiction of this case under Section 240 of the Judicial Code, as amended by the

act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (Tit. 28, Sec. 347, U. S. C. A.).

The case involves the construction and interpretation of Sec. 23 of the Bankruptcy Act (Tit. 11, Sec. 46, U. S. C. A.) in conjunction with Sec. 24 of the Judicial Code (Tit. 28, Sec. 41, Par. 1, U. S. C. A.).

The date of the judgment to be reviewed is June 29, 1934 (R. 56).

III.

STATEMENT OF THE CASE.

The general nature of the case has been stated in the petition under "A" (pp. 1-5) which is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS.

Petitioner respectfully submits:

(1) That the Court of Appeals erred in holding that general jurisdiction can be conferred by consent under the provisions of Sec. 23b of the Bankruptcy Act (Tit. 11, Sec. 46b, U. S. C. A.).

(2) That the Court of Appeals erred in holding that the county sheriff in the instant case, to whom, and as an officer of such State Court, a writ of execution and order of sale had issued out of the Court of Common Pleas of Hamilton County, Ohio, upon a judgment rendered by that court more than nine months before the filing of the voluntary petition in bankruptcy, under which a levy had been made by said Sheriff more than nine months preceding the bankruptcy, could or did, under the proceedings as shown in the record, oust the jurisdiction of the State court and confer a general jurisdiction on the United States District Court sitting in equity, under the provisions of Sec. 23 of the Bankruptcy Act (Tit. 11, Sec. 46, U. S. C. A.) and Sec.

24 of the Judicial Code, as amended (Tit. 28, Sec. 41, Par. 1, U. S. C. A.).

The questions involved thereunder are:

Whether general jurisdiction may be conferred by consent under the provisions of Sec. 23b of the Bankruptcy Act. (Tit. 11, Sec. 46[b], U. S. C. A.), and whether a sheriff of a county in Ohio, to whom, as an officer of a court of the State of Ohio, a writ of execution and orders of sale had been issued by said state court, in accordance with the execution statutes of Ohio, upon a judgment rendered by said state court more than four months before the bankruptcy, under which a levy had been made by said sheriff, also more than four months preceding bankruptcy, could or did, under the proceedings as shown in the record, oust the jurisdiction of the state court and confer general jurisdiction on the United States District Court sitting in equity.

We submit that the Court of Appeals erred in deciding all of these questions in the affirmative.

V.

ARGUMENT.

Point A.

The Court of Appeals Erred in Reversing the Judgment and Order of the District Court Dismissing the Suit for Want of Jurisdiction Because of Lack of Diversity of Citizenship.

The alleged bill in equity (R. 1-3) averred that the plaintiff is the duly appointed, qualified and acting Trustee in Bankruptcy of The Long & Allstatter Company of Hamilton, Ohio, Bankrupt. The alleged bill further admitted and averred that John C. Schumacher is the Sheriff of Butler County, Ohio, and as such, under process issued by the Court of Common Pleas of Hamilton County, Ohio, in cause

No. A-30454 on the docket of said court, had levied on certain property of The Long & Allstatter Company at Hamilton, Ohio, and was about to sell same under the orders of sale issued by said Court. The alleged bill, therefore, failed to show on its face jurisdiction in the court below for the reason that there was no diversity of citizenship under section 24 of the Judicial Code, as amended (Tit. 28, Sec. 41, par. 1, U. S. C. A.).

As the suit did not, of course, fall within the exceptions stated in Sec. 23b of the Bankruptcy Act, which relate to fraudulent transfers and preferences, which we have italicized in our quotation below of that statute, the District Court had no jurisdiction of the matter and properly dismissed the suit for want of jurisdiction and the Court of Appeals erred in reversing said judgment and order, unless general jurisdiction may be conferred by consent under the provisions of Sec. 23b of the Bankruptcy Act (Tit. 11, Sec. 46[b], U. S. C. A.).

Point B.

General Jurisdiction Cannot Be Conferred by Consent Under Paragraph b of Section 23 of the Bankruptcy Act and the Sheriff of Butler County, Ohio, Could Not and Did Not Confer Jurisdiction by Consent on the District Court.

Section 23 of the Bankruptcy Act, as amended May 27, 1926; c. 406, Sec. 8, 44 Stat. 664 (Tit. 11, Sec. 46, U. S. C. A.), provides:

> "*Jurisdiction; United States and State Courts.*
>
> (a) The United States District Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as

though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

(b) "Suits by the Trustee shall be brought or prosecuted only in the courts where the bankrupt, whose estate is being administered by such Trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, *except suits for the recovery of property under Section 96, subdivision b, of this title; Section 107, subdivision e, of this title; and Section 110, subdivision e, of this title.* (July 1, 1898, c. 541, Sec. 23, 30 Stat. 552; Feb. 5, 1903, c. 487, Sec. 8, 32 Stat. 798; June 25, 1919, c. 412, Sec. 7, 36 Stat. 840.)"

It will be seen, therefore, that this case involves the interpretation and construction of paragraph b of this section and the meaning of the words therein *"unless by consent of the proposed defendant."*

The decision in the instant case, predicated upon the *obiter dicta* of Judge Denison in a previous case decided by the same, the Circuit Court of Appeals for the Sixth Circuit, to-wit: the case of *Toledo Fence & Post Company* v. *Lyons,* 290 Fed. 637 (1929), that the consent of the Sheriff under the circumstances as shown in the record, could confer jurisdiction, is contrary to the decisions of the Circuit Court of Appeals for other circuits, as we have stated and shown in the petition herein.

We submit that general jurisdiction cannot be conferred by consent on the district courts and that paragraph b of Section 23 of the Bankruptcy Act does not mean or intend to authorize the conferring of general jurisdiction by consent and that the clause *"unless by consent of the proposed defendant"* relates to the matter of venue only.

Cases in other circuits, which so hold, are:

Matthew, et al., v. *Coppin*, 32 Fed. (2d) 100 (1929), (C. C. A. 9th Cir.).

"Appeal from the District Court of the United States for the Southern Division of the Northern District of California.

"Suit by George W. Coppin, as trustee in bankruptcy of the Flintex Corporation, against Andrew T. Matthew, as administrator of the Estate of Ralph L. Clements, deceased, and another."

Rudkin, J. "(1-3) The first assignment of error challenges the jurisdiction of the court below, and in this connection the radical difference between the two causes of action becomes important. Section 23b of the Bankruptcy Act, as amended (11 U. S. C. A., Sec. 46), provides that suits by a trustee shall be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section 60, subd. b (11 U. S. C. A., Sec. 96), section 67, subd. e (11 U. S. C. A., Sec. 107), and section 70, subd. e (11 U. S. C. A., Sec. 110). The three exceptions referred to are suits for the recovery of preferences given by the bankrupt within four months before the filing of the petition in bankruptcy, suits to set aside conveyances or transfers made by the bankrupt within four months prior to the filing of the petition, and suits to avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might have avoided. Unless a case falls within one of these three exceptions, a suit of this kind cannot be prosecuted in a federal court, unless there is the requisite diversity of citizenship between the bankrupt and the defendants. *True, the statute says unless by the consent of the proposed defendant, but the consent referred to is a consent to the local jurisdiction only, as where a defendant in any other action*

in the federal court is sued in the wrong district. Lovell v. *Isidore Newman & Sons,* 227 U. S. 412-420, 33 S. Ct. 375, 57 L. Ed. 577; *McEldowney* v. *Card* (C. C.), 193 F. 475; *Operator's Piano Company* v. *First Wisconsin Trust Company* (C. C. A.), 283 F. 904; *Coyle* v. *Duncan Spangler Coal Co.* (D. C.), 288 F. 897. *A defendant cannot confer jurisdiction upon a federal court by consent, unless jurisdiction is conferred by the general law''* (p. 101).

• • • • • • • • •

"In view of the fact that the objection to the jurisdiction was not raised below, no costs will be allowed in this court" (p. 102).

Rackmore v. *New Jersey Fidelity & Plate Glass Ins. Co., et al.,* 65 Fed. (2d) 341 (1933), (C. C. A. 2nd Cir.).

"Appeal from the District Court of the United States for the Southern District of New York.

"Suit by Max Rackmore, as trustee in bankruptcy of the M. C. T. Company, Inc., against the New Jersey Fidelity & Plate Glass Insurance Company and another. From a decree dismissing the bill of complaint on defendants' motion for want of jurisdiction because of lack of diversity of citizenship, complainant appeals. Affirmed."

Augustus N. Hand, J. "(3) Section 23b of the Bankruptcy Act (11 U. S. C. A., Sec. 46b), provides that suits between a trustee in bankruptcy and adverse claimants concerning property claimed by the trustee can be maintained only 'in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings . . . had not been instituted.' "

After referring to the exceptions stated in the statute referring to fraudulent conveyances and preferences, Judge Hand continues:

"The present suit is not one belonging to any of those classes. It therefore can be maintained in a

federal court only if the bankrupt might have brought it there. It must fail because M. C. T. Co., Inc., and the defendant Alpha are each New York corporations, so that diversity of citizenship is lacking. Such diversity is necessary to support federal jurisdiction and, without it, the trustee must proceed in the State Court" (p. 343).

Applicable decisions of this court on the matter are:

Lovell v. *Isidore Newman & Son,* 227 U. S. 412, 426;
Bush v. *Elliott,* 202 U. S. 477, 483;
Minnesota v. *Northern Securities Co.,* 194 U. S. 48 (1904);
Wood, Trustee, etc., v. *Wilbert's Sons, etc., et al.,* 226 U. S. 384 (1912);
In re Moore, 209 U. S. 490 (1908);
Interior Construction & Improvement Co. v. *Gibney,* 160 U. S. 217, 219 (1895);
Ex parte Schollenberger, 96 U. S. 369, 378 (1877)

In *Lovell* v. *Newman, supra,* this court said:

> Mr. Justice Day. "Furthermore the consent provided for in Sec. 23b certainly was not intended to enlarge the jurisdiction of the Circuit Courts of the United States so as to give them a jurisdiction which they would not have because of diverse citizenship and a requisite amount in controversy or by reason of a cause of action arising under the Constitution or laws of the United States" (p. 426).

Whether he did so willingly or unwillingly and under compulsion and duress, the Sheriff, as an officer of the State Court and required by law to execute the processes of the State Court, in behalf of the judgment creditor in the State Court, had no right or authority to oust the jurisdiction of the State Court and prejudice the rights of the judgment creditor in the State Court, by filing an answer consenting that the Federal Court take jurisdiction, after he

had theretofore raised the question of want of jurisdiction, by a motion to dismiss.

Blair v. *Brailey,* 221 Fed. 1 (1915), (C. C. A. 5th Cir.).

Walker, J. "When a court having jurisdiction of the parties and the subject-matter has taken property into its possession such property is thereby withdrawn from the jurisdiction of all other courts and the court so in possession has an ancillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property, though that court is not one of bankruptcy, and though the property so in its possession is part of the estate of one who was adjudged a bankrupt on a petition filed in a court of bankruptcy after the first-mentioned court's possession was acquired. *Murphy* v. *John Hofman Co.,* 211 U. S. 562; *Wabash Railroad* v. *Adelbert College,* 208 U. S. 38; *In re Antigo Screen Door Co.,* 123 Fed. 249. It follows that the questions as to the possession of property which were presented by the petition filed in the Georgia court by the trustee in bankruptcy were for the determination of that court alone, unless in some way it had surrendered its right to decide those questions and remitted the decision of them to some other tribunal. *Plainly the receivers, having the property in charge as mere agents of the court which appointed them, unless such power was conferred upon them by that court, were without power to do anything having the effect of ousting that court's jurisdiction over the property intrusted to their custody or of subjecting that property to the power or jurisdiction of another court. Whitney* v. *Wenman,* 198 U. S. 539" (p. 4).

Taubel, etc., Co., Inc., v. *Fox,* 264 U. S. 426 (1924).

Mr. Justice Brandeis. "*In this case, since the possession of the sheriff was the possession of the state court, the trustees' claim to the property would, under*

general principles of law, have to be litigated in the state court" (p. 430).

In *Coyle* v. *Duncan Spangler Coal Co.*, 288 Fed. 897 (1923), the court said:

McKeehan, J. "I think that the words 'unless by consent of the proposed defendant,' as used in section 23b, refer to cases that are within the general jurisdiction of the federal courts, albeit *not* within the jurisdiction of the particular court in which the suit is brought, and that they are not to be regarded as an attempt by Congress to grant to private litigants the power to confer upon the federal courts a jurisdiction which they would not otherwise possess.

"This question was considered by Mr. Justice Sanford in an instructive opinion in McEldowney v. *Card (D. C.), 193 Fed. 475, delivered when he was judge of the United States District Court for the Eastern District of Tennessee. He there construed section 23b as constituting merely a limitation upon the local jurisdiction of the particular court in which the suit is brought and therefore is one that may be waived by the defendant.* (p. 901).

"It seems to me that the words 'unless by consent of the proposed defendant,' as used in section 23b, should be construed in the light of the evident purpose of the first paragraph of the section, and in the light of the well-recognized distinction between what may be termed the general jurisdiction of the federal courts as distinguished from the local jurisdiction of a particular federal court, and *I am therefore of opinion that, irrespective of the defendant's consent, diversity of citizenship and the requisite jurisdictional amount are necessary to this court's jurisdiction over such a suit as this"* (p. 902).

Point C.

The District Court Had and Has No Right or Authority to Interfere with the Execution of the Judgment, Orders and Processes of the State Court, Which First Acquired Jurisdiction of the Matter, and, Therefore, on That Ground Properly Dismissed the Suit for Want of Jurisdiction and the Circuit Court of Appeals for the Sixth Circuit Erred in Reversing Said Order of Dismissal.

The Court of Common Pleas of Hamilton County, Ohio, had and has exclusive and continuing jurisdiction over and control of the property of The Long & Allstatter Company, levied upon by the Sheriff of Butler County, Ohio, on June 16, 1932, and the sole right and duty to determine questions arising on and under the execution of its said orders and processes, and, therefore, the District Court of the United States had and has no right to interfere with that jurisdiction.

Peck v. *Jenness,* 7 How. 612 (1849).
Farmers Loan & Trust Co. v. *Lake St. El. R. R. Co.,* 177 U. S. 51 (1900).
Wabash R. R. Co. v. *Adelbert College,* 208 U. S. 39 (1908).
Edward Murphy 2d. v. *John Hofman Co.,* 211 U. S. 562 (1909).
Taubel, etc., Co. v. *Fox,* 264 U. S. 426 (1924).
Harkin v. *Brundage,* 276 U. S. 36, 43 (1927).
In re Antigo Screen Door Co., 123 Fed. 249 (1903).
Williams v. *Neely,* 134 Fed. 1 (1904).
Bryan v. *Speakman,* 53 Fed. (2d) 463 (1931); certiorari denied, 285 U. S. 539.
In re Maier Brewing Co., Inc.; Simons v. *Wells,* 65 F. (2d) 673 (1933), (C. C. A. 9th Cir.).
Wayman v. *Southard,* 10 Wheat. 1, 23 (1825).
Boyle v. *Gray,* 28 Fed. (2d) 7, 9, 10 and 11 (1928); certiorari denied, 278 U. S. 653.

A forceful statement of the rule is found in *Maier Brewing Co., Inc.; Simons* v. *Wells* (C. C. A. 9th Cir.), supra, viz:

> Mack, J.: "In bankruptcy, as in equity, 'one court will not snatch a res from another's mouth,' *In re Greenlie-Halliday Co., supra.*"

The action of the District Court dismissing the suit is fully and completely sustained and required by the case decided by this court, which is the last word on the subject, to-wit:

Straton v. *New*, 283 U. S. 318.

In that case, Mr. Justice Roberts, after referring to the cases of *Metcalf* v. *Barker*, 187 U. S. 165; *Clarke* v. *Larremore*, 188 U. S. 486; and *Globe Bank* v. *Martin*, 236 U. S. 288, said:

> Mr. Justice Roberts: "Following these cases the Federal courts have with practical unanimity held that where a judgment which constitutes a lien on the debtor's real estate is recovered more than four months prior to the filing of the petition, the bankruptcy court is without jurisdiction to enjoin the prosecution of the creditor's action, instituted prior to the filing of a petition in bankruptcy, to bring about a judicial sale of the real estate. (Note No. 6.)
>
> "The trustee in bankruptcy may intervene in such suits to protect the interests of the estate. (Note No. 7.)
>
> "*It is clear that if the action in the State court was merely in the nature of an execution or proceeding to obtain the avails of the judgment lien it should not have been enjoined by the District Court.*" (pp. 326, 327).

The legality of the levy, if any question could be raised thereon, was a matter to be presented to and determined by the state court and that court alone.

Wabash R. R. Co. v. *Adelbert College,* 208 U. S. 39 (1908).
Edward Murphy 2d. v. *John Hofman Co.,* 211 U. S. 562 (1909).
Taubel, etc., Co. v. *Fox,* 264 U. S. 426 (1924).
Harkin v. *Brundage,* 276 U. S. 36, 43 (1927).
Blair v. *Brailey,* 221 Fed. 1 (1915), (C. C. A. 5th Cir.).

See also opinions of Mr. Chief Justice Taft and Mr. Justice Lurton when on the Court of Appeals for the Sixth Circuit, in the following cases:

American Ass'n Ltd. v. *Hurst, et al.,* 59 Fed. 1 (1893).
Southern Bank & Trust Company v. *Folsom, et al.,* 75 Fed. 929 (1896).

CONCLUSION.

That the question at issue is important, and that it arises under Federal law, and that it is one that should be settled, are, we think, self-evident propositions.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing said decision of the Court of Appeals of the Sixth Circuit.

Respectfully submitted,

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July 19, 1934.

APPENDIX A.

Statutes of the United States.

Section 24 of the Judicial Code, as amended, (Tit. 28, Sec. 41, par. 1, U. S. C. A.).

"The district courts shall have original jurisdiction as follows:

"(1) *United States as plaintiff; civil suits at common law or in equity.*—First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made. The foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section. (R. S. Secs. 563, 629; Mar. 3, 1875, c. 137, Sec. 1, 18 Stat. 470; Mar. 3, 1887, c. 373, Sec. 1, 24 Stat. 552; Aug. 13, 1888, c. 866, Sec. 1, 25 Stat. 433; Mar. 3, 1911, c. 231, Sec. 24, 36 Stat. 1091.)"

APPENDIX B.

Ohio Statutes.

General Code, Sec. 11655. *What subject to levy and sale.* Lands and tenements, including vested legal interests

therein, permanent leasehold estates renewable forever, and goods and chattels, not exempt by law, shall be subject to the payment of debts, and liable to be taken on execution and sold as hereinafter provided.

General Code, Sec. 11664. *Writ of execution.* The writ of execution against the property of a judgment debtor, issuing from a court of record, shall command the officer to whom it is directed, that of the goods and chattels of the debtor he cause to be made the money specified in the writ, and for want of goods and chattels, he cause his lands and tenements to be sold for cash. If the court rendering the judgment or decree so orders, real estate may be sold under execution as follows: one-third cash on the day of sale, one-third in one year, one-third in two years thereafter, with interest on deferred payments, to be secured by mortgage on the premises so sold. An execution on a judgment rendered against a partnership firm by its firm name shall operate only on the partnership property. The exact amount of the debt, damages and costs, for which the judgment is entered, shall be indorsed on the execution. (R. S. Sec. 5381.)

General Code, Sec. 11672. *Lands to be appraised.* When execution is levied upon lands and tenements, the officer who makes the levy shall call an inquest of three disinterested freeholders, residents of the county where the lands taken in execution are situated, and administer to them an oath impartially to appraise the property so levied upon, upon actual view. They forthwith shall return to such officer, under their hands, an estimate of the real value of the property in money. (R. S. Sec. 5389.)

General Code, Sec. 11675. *Land not to be sold for less than two-thirds appraised value.* No tract of land shall be sold for less than two-thirds of the value returned in the inquest; except that in all cases where a junior mortgage or other junior lien is sought to be enforced against real estate by an order, judgment or decree of court, subject to a prior lien or liens thereon, and such prior lien or liens, and the claims or obligations secured thereby, are unaffected by such order, judgment or decree, the court making such

order, judgment or decree, may determine the minimum amount for which such real estate may be sold, such minimum amount, however, to be not less than two-thirds of the difference between the value of the real estate appraised as provided in section eleven thousand six hundred and seventy-two, and the amount remaining unpaid on the claims or obligations secured by such prior lien or liens. (R. S. Sec. 5391.)

General Code, Sec. 11678. *Notices of sale of lands.* All notices and advertisements for the sale of lands and tenements located in a city or village in this state, made by virtue of proceedings in a court of record therein, in addition to a description of such lands and tenements, shall contain the street number of the building or buildings erected on the lands, or the street number of the lots offered for sale. If no such number exists, then the notice or advertisement must contain the name of the street or road upon which such lands and tenements are located, together with the names of the streets or roads immediately north and south or east and west of such lands and tenements, that cross or intersect the street or road upon which they are located. (93 v. 256, Sec. 1.)

General Code, Sec. 11681. *Notice of time and place of sale.* Lands and tenements taken in execution shall not be sold until the officer causes public notice to be given of the time and place of sale, for at least thirty days before the day of sale, by advertisement in a newspaper printed and of general circulation in the county. (R. S. Sec. 5393.)

General Code, Sec. 11688. *Confirmation and order for deed.* Upon the return of any writ of execution for the satisfaction of which lands and tenements have been sold, on careful examination of the proceedings of the officer, if the court finds that the sale was made, in all respects, in conformity to the provisions of this title, it shall direct the clerk to make an entry on the journal that the court is satisfied of the legality of such sale, and that the officer make to the purchaser a deed for the lands and tenements. (R. S. Sec. 5398.)